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In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CHARLIE CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM OF RESPONDENTS CHARLIE CONDON AND STATE OF SOUTH CAROLINA

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725, violates the Tenth Amendment.

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Respondents Charlie Condon and the State of South Carolina do not oppose the granting of the writ of certiorari in this case.[1] The court of appeals in this case declared the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§ 2721 - 2725 unconstitutional, as

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[1] Respondents Condon and State of South Carolina (hereinafter simply "Respondents") were the only active plaintiffs (appellees) in the Court of Appeals. The other respondents listed in the Petition are various media organizations who intervened to raise First Amendment claims. The district court dismissed their claims as moot, Pet. App. 40a n.3 and 72a. These organizations did not seek to participate as parties in the court of appeals, and that court denied their motion to file an amicus curiae brief on the First Amendment issues. Pet. App. 2a n.1.

Respondents had urged. The four circuits in which the issue has arisen are evenly split in their results.[2] Clearly, a decision of this Court is necessary to resolve the present inconsistency in the enforceability of this statute in different regions of the country.

While not opposing certiorari, Respondents Condon and the State of South Carolina suggest, as set forth more fully at the end of this Memorandum, that the question presented by Petitioner is considerably broader than the points actually argued in the Petition. The Petition argues only Tenth Amendment issues, but Petitioner's statement of the question is capable of a broader construction.

Also set forth herein are a Counterstatement of the Case and a brief statement of Respondents' position on the merits of the issues presented by the Petition.

COUNTERSTATEMENT OF THE CASE

1. *Procedural History.*

In this action, the State of South Carolina and its Attorney General challenged the constitutionality of the

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[2] In the present case and in *Pryor v. Reno*, 1999 WL 187050 (11th Cir. 4/6/99), the DPPA was held unconstitutional. In *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) and *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), the constitutionality of the Act was sustained. As far as counsel is aware, no challenges to the DPPA are presently pending in any other circuit.

DPPA. The district court held that the Act violated the Tenth Amendment, and enjoined its application shortly before it was scheduled to take effect in September 1997. Pet. App. 38a-56a, 72a. The district court further held that the DPPA could not be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Pet. App. 56a-72a. The court of appeals affirmed on both grounds. Pet. App. 1a-26a. In its Petition for Certiorari, the Government does not argue, and apparently waives, the contentions it made below concerning Section 5 of the Fourteenth Amendment.

2. *The Driver's Privacy Protection Act.*

The DPPA consists of a command by Congress to the States not to disclose specified information in driver's license and motor vehicle records, followed by a long list of exceptions. The general rule against disclosure, if a rule so exception-ridden can be said to be general at all, is found in 18 U.S.C.§ 2721(a). The exceptions are set forth in 18 U.S.C. § 2721(b)(1) through –(b)(14).

The Act also contains several provisions which require the States to disclose personal information from DMV databases for certain purposes. 18 U.S.C. §2721(b). Although the Government argues that the Act "does not require any affirmative act by state motor vehicle agencies," Pet. 5, this section would appear to provide to the contrary. The Eleventh Circuit in *Pryor v. Reno*, *supra*, 1999 WL 187050 at *1, *4, concluded that this part of the Act "requires" the States to make disclosures under the

listed circumstances.[3]

The administration of the statute is made complicated by the number and nature of the many exceptions. Some involve use of the records in the operation of governments and businesses. See, e.g., 18 U.S.C. § 2721(b)(1), –(b)(2), –(b)(4) (permissible to release records to government agencies exercising law enforcement and other functions); 18 U.S.C. § 2721(b)(3) (permissible to release records to "a legitimate business," but only for certain purposes). Other exceptions which 18 U.S.C. § 2721(b) permits to the general rule of nondisclosure include disclosure to insurers, disclosure to towing services, disclosure to licensed private investigators or security services, and disclosure in connection with commercial drivers and toll transportation facilities. 18 U.S.C. § 2721(b)(6), –(b)(7), –(b)(8), –(b)(9) and –(b)(10). Disclosure by consent of an individual is permitted by 18 U.S.C. § 2721(b)(13). In 18 U.S.C. § 2721(b)(11), Congress authorizes unlimited individual disclosures of the records by the States, so long as the States have first provided motor vehicle owners a clear and conspicuous way to prohibit such disclosures. Even when the States have received permission from owners to make unlimited *individual* disclosures under 18 U.S.C. § 2721(b)(11), however, the States still may not make *bulk* disclosures of motor vehicle information unless

[3] The Attorney General of California has concluded that the Act requires disclosures of matters which under California law had previously not been subject to disclosure. 79 Op. Cal. Att'y. Gen. 76 (1996).

the States first provide individuals "an opportunity, in a clear and conspicuous manner, to prohibit such uses," i.e., uses involving bulk disclosures. 18 U.S.C. § 2721(b)(12)(A). The last of the fourteen exceptions permits disclosure "for any other use specifically authorized under the law of the State that holds the record," but only if "such use is related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14). The court in *Pryor v. Reno, supra,* concluded after reciting this list of exceptions that "Congress riddled the Act with more holes than Swiss cheese." 1999 WL 187050 at *3.

This complex Congressional directive to the States would require considerable effort to administer in practice. An employee or official of a Department of Motor Vehicles would need to review each specific request in order to make a judgment whether the requested disclosure is mandated by the Act, prohibited by the Act, or permitted (in whole or in part) by one of the many exceptions. A state official would thus need to make judgment calls about the statute's application.[4] That state official would be the person who would be seen as granting or denying the request and who could bear the blame for any errors.

The state official could receive more than simply

[4] The Eleventh Circuit has pointed out that the Act "contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information." *Pryor, supra,* 1999 WL 187050 at *4.

blame for erroneous decisions about whether to disclose or withhold information. The Act creates potentially severe federal penalties for erroneous decisions by state officials. A state DMV employee or official who "knowingly violates this chapter" can be charged with a federal crime and fined if found guilty. 18 U.S.C. § 2723(a). In addition, 18 U.S.C. § 2724 exposes state officials and employees to the full plethora of federal civil remedies if such persons can be proven to have knowingly disclosed personal information from a motor vehicle record for a purpose not permitted under the Act. These remedies include actual damages of a minimum of $2,500, punitive damages if the disclosure is willfully or recklessly made, attorneys' fees, and equitable relief.[5]

South Carolina's response to the problem of potential misuse of the information in DMV databases has been to enact legislation which requires a person requesting such information to sign a form which lists the requestor's name and the reason for the request. *S.C. Code Ann.* §56-3-510 (Cum Supp. 1999). These forms are kept for five years. Any person whose motor vehicle information is disclosed may examine the form signed by

[5] In South Carolina seventy field offices have full access to the federally-proscribed records. Many or most other States undoubtedly have the same widespread access to records by field offices. Considerable training of numerous persons would be required in order for the State to try to avoid unintentional erroneous disclosures by its officials and employees. C.A. App. 17. It was undisputed below that the Act would impose substantial cost and effort on the DMV in order to obtain compliance. *See* Pet. App. 44a.

the person who requested to see the information. *S.C. Code Ann.* §56-3-520 (Cum Supp. 1999).[6] These statutes were enacted in 1996; the courts of South Carolina have not yet had occasion to decide whether they prohibit the bulk sale of information in the DMV databases.[7]

[6] South Carolina law also makes stalking a criminal offense, *S.C. Code Ann.* §§ 16-3-1700, *et seq.*, and increases the penalty if DMV records were used by the stalker. *S.C. Code Ann.* §§ 16-3-1710(C), 16-3-1720(C).

[7] A temporary provision enacted in South Carolina in 1997 and 1998 permitted the bulk sale of drivers' license information, including digitized photographs, for the prevention of fraud. S.C.Act No. 155 of 1997, Part I, § 34.15; Act No. 419 of 1998, Part I, § 36.12. The state Department of Public Safety contracted with a private company for the sale of this information. Had the DPPA been in effect in South Carolina, it would not have affected this transaction; 18 U.S.C. § 2721(b)(3) permits disclosures for such purposes as fraud prevention.

The sale of the drivers' photograph database in South Carolina and in two other states eventually became the subject of considerable publicity. *See, e.g.*, Washington Post, Jan. 22, 1999 at A01. The Attorney General of South Carolina, one of the Respondents in this case, challenged the release of this database in state court, citing the state constitutional provision protecting the right to privacy. *S.C. Const.* Art. I, § 10. Preliminary relief was denied, but the case is still pending as of this writing. *Condon v. Image Data, LLC*, No. 99-CP-40-0290 (Richland Co., S.C., Court of Common Pleas). Eventually the Governor of South Carolina terminated the contract of sale in March 1999. This controversy has directed the attention of the South Carolina General Assembly to database privacy issues; at a minimum, it is unlikely that the temporary provisions cited above will be renewed.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THE COURT TO CONFIRM THAT THE DPPA IS UNCONSTITUTIONAL

1. In *New York v. United States*, 506 U.S. 144 (1992) and Printz v. United States, 117 S.Ct. 2365 (1997), this Court unequivocally condemned federal legislation which seeks to use the States as the implementors of Congress's policy choices:

> "We . . . conclude categorically, as we concluded categorically in *New York*: 'The Federal Government may not compel the States to enact *or administer* a federal regulatory program.' *Id.*, at 188."

Printz, 117 S.Ct. at 2383 (emphasis added). *Printz* makes frequent reference to the Tenth Amendment's prohibition of federal statutes that require States to administer federal programs. 117 S.Ct. at 2371 n.2., 2374 n. 8, 2378 n.12, 2380, 2381, 2384. The courts of appeals in this case and in *Pryor v. Reno* both held that the vice of the DPPA was that it required the States to administer its provisions. Pet. App. 14a-15a; 1999 WL 187050 at *4 - *5. Respondents submit that this case involves only the straightforward application of the principles set forth in *New York* and *Printz*, as the Fourth and Eleventh Circuits have held.

The Government cannot reasonably deny that the DPPA requires state officials to administer its provisions, and it puts little effort into attempting such a denial. The

practical reality of the matter is that the DPPA commands the States to maintain a broad and ongoing administrative effort. A typical application of the DPPA would occur when a person requests information from a state DMV about a person in the DMV database, as permitted by the law of the State. The state DMV official would first need to determine whether the request seeks "personal information" as defined by the DPPA. If so, the state DMV official would then need to ascertain whether the request fits falls within one of the mandatory disclosure provisions of the DPPA. If disclosure is not mandated but might be prohibited, the state DMV official would then be required to determine whether the request falls within one of the DPPA's many permissive exceptions. If the request is not for a purpose permitted by the DPPA, the DPPA would require the state DMV official to refuse the request. Clearly state DMV officials are the ones who must administer the DPPA's commands on a daily basis. State officials would be made the gatekeepers for state information, not because the *States* have decided the information is private, but because *Congress* has so decided. As in *Printz*, "it will be the [state official] and not some federal official who stands between [the requestor and his or her request]. And it will likely be the [state official], not some federal official, who will be blamed for any error . . . ." 117 S.Ct. at 2382.

New York and *Printz* also hold more broadly that Congress must "regulate individuals, not States." *New York*, 505 U.S. at 166.; *Printz*, 117 S.Ct. at 2377. The DPPA does more than violate the Tenth Amendment's prohibition against statutes which require States to

administer federal regulatory programs. It also improperly forces States to regulate.

The DPPA forces States to exercise regulatory power over individuals whenever the States restrict individuals' access to information. This command to the States to regulate is in clear violation of the holdings of *New York* and *Printz*. The States under the DPPA would regulate the public's access to state-held drivers' license information; the fact that the federal regulation is primarily in the form of a command to withhold something rather than to take an affirmative act does not make it any less a regulation.[8] Moreover, since 18 U.S.C. § 2721(b) requires the States to make certain disclosures, as the Eleventh Circuit held in *Pryor v. Reno*, the Government's argument that the DPPA requires no affirmative act by the States is simply not true.

The coerced use of state officials to carry out federal policy choices is precisely what *New York* and *Printz* disapproved. The underlying rationale for both cases is that in order for accountability to occur in this country's dual-sovereignty system of government, the

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[8] Both the Seventh and Tenth Circuits appear to have assigned some importance to the fact that violations of the Act are policed by the federal government rather than by the States. *Oklahoma*, 161 F.3d at 1272 (Act "does not conscript state officials to enforce federal law"); *Travis*, 163 F.3d at 1003 (suggesting that the measure of constitutionality is whether Congress "assign[s] the enforcement duty to federal officials"). Similar enforcement duties were retained by the federal government in the Brady Act, a fact which did not affect the result of *Printz*.

federal government cannot accomplish its purposes while lurking behind state officials. Otherwise, "Members of Congress can take credit for 'solving' problems," while the States are "put in the position of taking the blame for [the federal program's] burdensomeness and its defects." *Printz*, 117 S.Ct. at 2382.

There can thus be no question that the DPPA is unconstitutional under both the language and the rationale of *New York* and *Printz*. The Government ignores both the literal language of those cases and the reasons underlying their results.

2. The Government's primary argument, made largely without reference to the Tenth Amendment, is that the DPPA is as valid a Commerce Clause regulation of the States as, for instance, the Fair Labor Standards Act as analyzed in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Pet. 13-17. *New York* and *Printz*, however, establish that the Tenth Amendment prohibits statutes which direct States to regulate or to administer federal programs, even though such statutes might otherwise be valid exercises of Commerce Clause power. Once it is established, as it is here, that Congress has violated the Tenth Amendment by issuing direct commands to the States to regulate or administer, the statute is not saved by pointing out a Commerce Clause basis for it.

As in *Printz*, where the statute in question involved "the forced participation of the States' executive in the administration of a federal program," 117 S.Ct. 2376,

there was no need to consider "whether the incidental application of a federal law of general applicability excessively interfered with the functioning of state governments." *Id.* at 2383. Since "the whole *object* of the law [was] to direct the functioning of the state executive," the "balancing" which was done in cases such as *Garcia* is inappropriate. *Id.* (emphasis in original). An act such as the DPPA offends "the very *principle* of separate state sovereignty . . ., and no comparative assessment of the various interests can overcome that fundamental defect." *Id.* (emphasis in original).

The Government's principal argument also fails because the DPPA is in no way a law of general applicability which incidentally applies to the States, as the statutes in *Garcia* and in *South Carolina v. Baker*, 485 U.S. 505 (1988) were characterized by the Court.[9] The first and most obvious reason why is that the Act applies only to States. This is not coincidental, since only States license drivers and vehicles. As in *Printz*, any suggestion that the Act could be extended to private citizens "posits the impossible." 117 S.Ct. at 2383 n.17. Secondly and equally obviously, Congress "has thus far regulated the disclosure of personal information by holders of databases only in piecemeal fashion." *Pryor, supra*, n.7; Pet. App. 16a-17a. The Government attempts to characterize the DPPA as a law of general applicability by cobbling it together with other equally-isolated instances of database

[9] As explained by the Court, *Baker* involved a statute which covered not only state-issued bearer bonds, but also those issued by the United States and private corporations. 485 U.S. at 510.

regulation, but the whole adds up to even less than even the paltry sum of its parts. Congress simply has made no effort to enact generally-applicable database privacy legislation.[10]

The Government can cite no case in which a statute held to be a valid exercise of Commerce Clause power applied to States and to no one else. Only federal statutes of general applicability have been sustained when applied to States as an exercise of Commerce Clause power. In both *New York* and *Printz*, this Court characterized the cases cited or relied upon here by the Government as cases where State governments were subjected to generally applicable laws. *New York*, 505 U.S. at 160; *Printz*, 117 S.Ct. at 2383 ("incidental application to the States of a federal law of general applicability").

The Government thus urges a result in this case which would substantially contract the Tenth Amendment protections previously set in this Court's decisions. This Court has never held, and should not now hold, that Commerce Clause power may be exercised in such a fashion that it can validly affect activities in which only States are engaged.

3. The Government's final argument, Pet. 20-21,

[10] As a demonstration of how far-fetched the Government's argument is, the court of appeals in this case noted that this Court in *Garcia* would not likely have applied the Fair Labor Standards Act to the States if it had previously applied only to video stores, cable providers, and credit bureaus. Pet. App. 19a.

amounts to little more than saying that the alleged merit of a statute justifies its overstepping the bounds of federalism. Similar arguments were rejected in both *New York* and *Printz*:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Printz, 117 S.Ct. at 2383, quoting *New York*, 505 U.S. at 187.

But even if the issue of the merit of the statute were relevant, the DPPA is surely one of Congress's least effective efforts at regulation. The Act's exceptions are numerous and its verification requirements nonexistent. The net result is that the Act is capable of manipulation by any unscrupulous person willing to exercise only slight creativity in framing a request which would fall within one of the permitted exceptions.

The breadth of the exceptions to the DPPA is such that the Act did not prevent the sale of entire state drivers' license databases, including photographs, to a private contractor seeking to establish a fraud protection business. *See* n. 7, *supra*. Such sales occurred not only in South Carolina, but also in Florida and Colorado, where the DPPA was in effect at the time of the sales. These sales, later revoked by the Governors of all three States, were permissible under 18 U.S.C. § 2721(c), which allows anyone who receives the database for an authorized use (in this instance, fraud prevention under 18 U.S.C. § 2721(b)(3)) to resell the database to someone else for the same purpose.

4. Finally, the Government argued unsuccessfully in both the district court and the court of appeals that the Act could in any event be sustained as an exercise of Congressional power under Section 5 of the Fourteenth Amendment. The Government makes no reference to the Fourteenth Amendment in its argument in the Petition, and accordingly should be deemed to have abandoned the point. The Government's abandoned argument was without merit in any event, as the court of appeals held. Pet. App. 22a-26a; *accord, Pryor, supra*, 1999 WL 187050 at n.10. However, the question framed in the Petition is so broadly stated as to raise a possibility that the Section 5 issue might still appear in the Government's briefs on the merits should certiorari be granted. In order to avoid the inclusion of this issue not argued in the Petition, Respondent submits that the question should be narrowed as set forth at the beginning of this

Memorandum. in order to make it clear that the Government may attack the judgment below only on Tenth Amendment issues.

CONCLUSION

For the foregoing reasons. Respondents submit that the Petition should be granted, limiting the issue raised by the Government to whether the DPPA violates the Tenth Amendment.

Respectfully submitted.

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